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No. 98-1856

IN THE
Supreme Court of the United States

LALIA JEANNE HILL, *et al.*,
Petitioners,

v.

COLORADO,
Respondent.

On Writ of Certiorari to the Supreme Court of Colorado

BRIEF FOR THE AMERICAN FEDERATION OF LABOR AND CONGRESS OF INDUSTRIAL ORGANIZATION AS AMICUS CURIAE IN SUPPORT OF PETITIONERS

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INTEREST OF THE AMICUS CURIAE

This brief *amicus curiae* is filed by the American Federation of Labor and Congress of Industrial Organizations, a federation of 68 national and international unions representing approximately 13,000,000 working men and women, with the consent of the parties as provided for in the Rules of this Court.

Historically, the AFL-CIO, and its affiliated unions, have had a vital interest in the First Amendment rights

of citizens to disseminate their views on the public streets by picketing, handbilling and other communicative means. Indeed, many of the leading cases that this Court has decided in the First Amendment area have involved the efforts of union members to engage in such expressive activities.[1] That being so, the AFL-CIO has filed briefs as an *amicus curiae* in a substantial number of this Court's recent cases involving the exercise of First Amendment rights on the streets.[2] And, it is in furtherance of that interest that the AFL-CIO files this brief *amicus curiae* in the instant case.

SUMMARY OF ARGUMENT

Four aspects of the Colorado statute in question here frame the constitutional issue:

First, although the articulated legislative purpose is preventing "willful obstruction of a person's access" to medical facilities, the Statute applies whether or not the individual whose speech is thus prohibited has in the past obstructed or is currently obstructing, or threatening to obstruct, any other individual's access to the medical facility.

Second, the Statute singles out speech for prophylactic regulation.

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1 *See, e.g., Hague v. CIO*, 307 496 (1989); *Schneider v. State*, 398 U.S. 147, 155 (1939); *Thornhill v. Alabama*, 310 U.S. 80 (1940); *Thomas v. Collins*, 323 U.S. 516 (1945); *NLRB v. Fruit Packers*, 377 U.S. 58 (1954); *DeBartolo v. Florida Gulf Coast Trades Council*, 486 U.S. 568 (1988).

2 *See, e.g., Schencke v. Pro-Choice Network of Western New York*, 519 U.S. 357 (1997); *Madsen v. Women's Health Center*, 512 U.S. 752 (1994); *International Society for Krishna Consciousness v. Lee*, 505 U.S. 672 (1992); *United States v. Kokinda*, 497 U.S. 720 (1990); *Frisby v. Schultz*, 487 U.S. 474 (1988); *Board of Airport Commissioners v. Jews for Jesus, Inc.*, 483 U.S. 589 (1987); *Heffron v. International Society for Krishna Consciousness*, 453 U.S. 540 (1981).

Third, the Statute entirely precludes normal handbilling and leafletting.

Fourth, the Statute as it applies to oral communication regulates speech on the basis of its content.

The Colorado Supreme Court viewed this case as one raising only the validity of a limited time, place and manner statutory restriction on speech in a public forum. And, a "content-neutral" statutory regulation of speech in a public forum, such as a public sidewalk, can pass First Amendment muster if it furthers a substantial governmental interest unrelated to the suppression of speech and is narrowly tailored to that interest. The office of the narrow tailoring requirement is to preclude regulation that "burdens substantially more speech than is necessary to further the government's legitimate interests," *Ward v. Rock Against Racism*, 491 U.S. 785, 791 (1989).

The Statute in this case states the only government interest Colorado has ever asserted: "preventing the willful obstruction of a person's access to medical counseling and treatment at a health care faciilty." And, the handbilling, leafletting, sign display and oral protest the statute restricts do not in and of themselves involve physical obstruction of access to the addressee's destination whether the individual engaged in the communicative activity approaches within eight feet of the addressee or not. Any connection between the prohibited speech activity and obstruction is entirely contingent.

This Court has never sanctioned a purely contingent connection of this kind as the basis for a prophylactic prohibition of protected speech actiivty in a public forum. To the contrary, where, as here, speech activity can be carried out in a way that does *not* compromise a neutral non-speech governmental interest *or* in a way that does compromise the latter, the Court has approved a time,

place and manner restriction *only* where the regulation restricts speech activity that in fact involves an *actual* intrusion on the non-speech government interest, and the regulation does *not* restrict speech activity that does *not* in fact involve an actual intrusion on the non-speech government interest.

The Statute here does not respect that limitation for it enacts a general prophalactic restriction on public forum speech actiivty that without limit or distruction applies to speech activity that does not in fact involve any physical obstruction of access. That being so the Statute fails the narrow tailing requirement of the First Amendment time, place and manner standard.

ARGUMENT

CONSIDERED AS A TIME, PLACE AND MANNER LIMITATION ON SPEECH IN A PUBLIC FORUM THE COLORADO STATUTE IS UNCONSTITUTIONAL IN THAT IT BURDENS SUBSTANIALLY MORE SPEECH THAN IS NECESSARY TO FURTHER THE GOVERNMENT'S LEGITIMATE, NON-SPEECH RELATED INTERESTS.

A. The Colorado statue at issue in this case, Section 18-9-122 C.R.S. (1994 Cum. Supp.) ("the Statute") reads, as here relevant:

> (1) The general assembly recognizes that access to health care facilities for the purpose of obtaining medical counseling and treatment is imperative for the citizens of this state; that the exercise of a person's right to protest or counsel against certain medical procedures must be balanced against another person's right to obtain medical counseling and treatment in a nunobstructed manner; and that preventing the willful obstruction of a person's access to medical counseling and treatment at a health care facility is a matter of statewide concern.
>
> The general assembly therefore declares that it is appropriate to enact legislation that prohibits a person from knowingly obstruction another person's entry to or exit from a health care facility.
>
> * * *
>
> (3) No person shall knowingly approach another person within eight feet of such person unless such other person consents for the purpose of passing a leaflet or handbill to, displaying a sign to, or engaging in oral protest, education, or counseling with such other person in the public way or sidewalk area within a radius of one hundred feet from any entrance door to a health care facility.

Four aspects of this criminal prohibition are particularly significant for purposes of constitutional analysis:

First, although the articulated legislative purpose is preventing "willful obstruction of a person's access" to medical facilities, the Statute applies *whether or not the individual whose speech is thus prohibited has in the past obstructed or is currently obstructing, or threatening to obstruct, any other individual's access to the medical facility*. The plaintiffs here, for example, were prevented from coming closer than eight feet to pedestrians on public sidewalks near medical clinics even though they "have not engaged in, and do not intend to engage in, . . . dangerous and harassing conduct." *Hill* v. *Thomas,* 973 P.2d 1246, 1251 (Colorado S. Ct. 1999).

Thus, as this case illustrates, the Statute's prohibition obtains even though there is *no* basis for concluding that activity of the kind proscribed, considered either individually or in the aggregate, by its nature, or by habitual practice, entails "obstruction of a person's access" to a medical facilty. And, to make the matter all the more binding, the Statute's prohibition obtains at *all* health care facilities, including many types of facilities at which there has never been obstruction of access by any handbillers, leafletters, sign displayers or oral protestors.

Second, the Statute singles out speech for prophylactic regulation, even though the articulated legislative purpose is to prevent conduct that can occur with or without speech, and even though it is not unusual for one individual to come closer than eight feet to another individual on the public streets without the latter's express consent.

An individual can engage in conduct that obstructs another individual's access to a medical facility without also engaging in leafletting, handbilling, sign display or oral protest. And, individuals engaging in such obstructive conduct would do so by approaching within eight feet of

the individuals seeking access to the facility. So far as we are aware, however, neither this Statute, nor any other Colorado statute, prevents individuals on public sidewalks 100 feet from medical facilities from coming closer than eight feet to other individuals *unless* the approaching individual is engaged in leafletting, handbilling, sign display or oral protest. With the one exception of this Statute, then, Colorado regulates the behavior of persons on the public streets in order to prevent obstruction of access to medical facilities only by proscribing *actual* obstruction.

Third, the Statute entirely precludes normal handbilling and leafletting. Ordinarily, a handbiller or leafletter does not stand in a location and wait to be approached by passersby. Doing so is unlikely to attract many takers for the simple reason that by and large individuals on public streets are bound for a destination on a determined course. That being so, a handbiller, after choosing a location at which she can reach her intended audience, walks a few steps toward individuals making their way to that location, coming close enough to extend her arm and make it possible for passersby to take the handbill by simply extending their arms slightly without changing their course. Since few people have arms that are four feet long, the eight-foot limitation here precludes handbilling in its normal sense.

The "consent" exception does not alter this conclusion. Again, individuals who are on the public street are normally going somewhere. While such pedestrians may take a proffered handbill and read it then, or later, if they can do so without straying from their intended path, they are unlikely in the extreme to cease their progress toward their destination in order to consider a request from a handbiller standing eight feet away to permit the opportunity to

make the proffer. Indeed, by the time the handbiller is able to intelligibly verbalize a request for consent to approach the addressee, the passerby is likely to be even further away from the handbiller than originally, and even less likely to halt or reverse direction in order to answer the request and then receive the handbill.[3]

Fourth, the Statute as it applies to oral communication regulates speech on the basis of its content. An individual who approaches closer than eight feet to another individual on a public street within 100 feet of a medical facility to ask for directions or for the time, to conduct a survey, to hand out free samples of a product and pitch the product's virtues, or to solicit funds for a charity is not, in any ordinary use of the words, "engaging in oral protest, education, or counseling." Such an individual is therefore free to approach other individuals near medical facilities as elsewhere, whether the person approached has consented to the conversation in advance or not.

In contrast, anti-abortion protestors such as the plaintiffs here, workers seeking to inform patients of a labor dispute at the medical facility and request support for a boycott, animal rights protestors desiring to educate users of a medical facility of the use of animals in experiments and training so that the patients will complain to their

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[3] All of the foregoing is equally applicable to an individual on a public forum who wishes to communicate her oral protest message to passersby.

In contrast, signs can be made visible at a distance of eight feet, and no further communication or interaction with the addressee is needed to convey the sign displayer's message. Thus, an eight foot space limitation on the display of signs cannot by a parity of reasoning, be said to preclude normal sign display in the same manner as the limitation precludes handbilling. But the limitation, we believe, does have a "material impact" on the sign display form of communication by placing artificial constraints on a speech activity that is protected by the First Amendment and that does not intrude on any legitimate government interest. *Cf. Ward v. Rock Against Racism*, 491 U.S. 781 (1989).

doctors, and other patients seeking to communicate with fellow users of the facility concerning problems with the services provided—not unusual in this era of discontent with managed medical care—would all be subject to the eight foot/consent limitation. By any measure, this regulation of oral communication is regulation of speech on the basis of its content.

Given these four characteristics, the Statute is, under this Court's precedents, unconstitutional, and cannot stand—as we now show.

B. The Colorado Supreme Court viewed this case as one raising only the validity of a limited time, place and manner restriction on speech in a public forum. There is, we believe, a substantial question as to whether that is a proper characterization of the statute here. But because the Statute so clearly fails the time, place and manner standard, we accept and proceed on the Colorado Supreme Court's premise rather than joining the issue at this threshold point.

Other considerations aside, a "content-neutral" regulation of speech in a public forum, such as a public sidewalk, can pass First Amendment muster if it furthers a substantial governmental interest unrelated to the suppression of speech and is narrowly tailored to that interest. *Turner Broadcasting System, Inc. v. Federal Communications System, Inc.*, 512 U.S. 622, 662 (1994), *citing Ward v. Rock Against Racism, supra.* The office of the narrow tailoring requirement is to preclude regulation that

> burdens substantially more speech than is necessary to further the government's legitimate interests. Government may not regulate expression in such a manner that a substantial portion of the burden on speech does not serve to advance its goals. . . . [*Ward*, 491 U.S. at 799.]

Thus, although the time, place and manner intermediate level of scrutiny regarding the "fit" between the governmental interest and the breadth of regulation is less than that applied in other First Amendment contexts, the judicial inquiry into the relationship between means and ends is a careful one, "focussing on the evils the [Government] seeks to eliminate" and asking whether the regulation at issue "significantly restrict[s] a substantial quantity of speech that does not create the same evils." *Ward*, 491 U.S. at 799 n.7; *see also Clark v. Community for Creative Non-Violence*, 468 U.S. 288, 297 (1984).

The Statute in this case recites in its body the only government interest Colorado has ever asserted: "preventing the willful obstruction of a person's access to medical counseling and treatment at a health care facility." Section 18-9-122(1) C.R.S. (1994 Cum. Supp.). Focusing, as this Court has directed, on that "evil," it is apparent that the Statute "significantly restricts a substantial quantity of speech that does *not* involve the "willful obstruction of a person's access to . . . a health care facility."

Handbilling, leafletting, sign display and oral protest do not in and of themselves involve physical obstruction of access to the addressee's destination whether the individual engaged in the communicative activity approaches within eight feet of the addressee or not. Rather, the Legislature relied on the fact that "on occasion" individuals approaching a particular kind of medical facility—those at which abortions are performed—have been "physically assaulted [by anti-abortion protestors] while entering or leaving" those health care facilities. 973 P.2d at 1250. In other words, the connection between the prohibited speech activity and obstruction is entirely contingent: In some instances—"on occasion"—speech activities abutting on medical faciilties are associated with

obstruction through physical assaults or otherwise. In other instances, by definition the majority, the handbillers/protestors, like the petitioners in this case, never pose the "evil" of obstruction of access through physical assault or otherwise at which the Statute is aimed.[4]

This Court has never sanctioned a purely contingent connection of this kind as the basis for a prophylactic prohibition of protected speech activity in a public forum. Rather, the time, place and manner restrictions that the Court has sanctioned have rested on a necessary connection between the speech activity regulated and the "evil" the Government "seeks to eliminate."

(1) In some instances, the non-speech governmental interest is "intrinsic" to each exercise of a speech activity, so that the unregulated speech activity is "naturally incompatible with a large, multipurpose forum." *International Society for Krishna Consciousness v. Lee*, 505 U.S. 672, 690 (1992) (O'Connor, J. concurring). For example, in *Ward, supra,* the regulation at issue dealt with the "evil" of "excessive and inadequate sound amplification" at concerts in a public park. That regulation governed only concerts that were sound amplified and the regulation did so not by "ban[ning] all [such] concerts, or even all rock concerts, but instead by focus[ing] on the source of the evils the city seeks to eliminate—excessive and inadequate sound amplification—and eliminates them without at the same time restricting a substantial quantity of speech that does not create the same evils." 491 U.S. at 799, n.7.[5]

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[4] This is particularly true because the Statute applies to all medical facilities, while the instances that led to legislative concern appear to have been protests at abortion facilities.

[5] The Court in *Ward*, indeed, explicitly contrasted the impact of the regulation in that case with the impact of a ban on handbilling,

Similarly, in *City Council of Los Angeles v. Taxpayers for Vincent*, 466 U.S. 789 (1984), the government interest served by the challenged restriction was elimination of visual clutter. By banning signs attached to utility poles, "the City did no more than eliminate the exact source of the evil it sought to remedy." 466 U.S. at 808. In explaining this conclusion, the Court contrasted such an "intrinsic" connection between a governmental interest and a mode of communication with a contingent connection, making clear that the former but not the latter meets the narrow tailoring aspect of the time, place and manner standard:

> It is true that the esthetic interest in preventing the kind of litter that may result from the distribution of leaflets on the public streets and sidewalks cannot support a prophylactic prohibition against the citizens' exercise of that method of expressing his views. . . . *Schneider v. State*, 308 U.S. 147 (1939) . . . The rationale of *Schneider* is inapposite in the context of the instant case . . . [T]here is no constitutional impediment to "the punishment of those who actually throw paper on the streets. . . ." With respect to signs posted by appellees, however, it is the tangible medium of expressing the message that has the adverse impact on the appearance of the landscape. In *Schneider*, an anti-littering statute could have addressed the substantive evil without prohibiting expressive activity . . . . Here, the substantive evil—visual blight—is *not merely a possible by-product of the activity but is created by the*

noting that the latter "of course, would suppress a great quantity of speech that does not cause the evils that it seeks to eliminate . . . . [and] would be substantially broader than necessary to achieve the interests justifying it." *Id.* As noted above and discussed further below, the Statute in this case amounts as a practical matter to a ban on handbilling near a medical facility.

> *medium of expression itself*. In contrast to *Schneider*, therefore, the application of ordinance in this case responds precisely to the substantive problem which legitimately concerns the City. [466 U.S. at 808-810, emphasis supplied.][6]

Here, in contrast, there is nothing intrinsically obstructive in the leafletting, handbilling, sign display, and oral protest modes of communication at less than eight feet from the intended addressee; only when the speaker *also* engages in physically obstructive conduct are the two conjoined.

(2) Where a speech activity on a public forum and the non-speech "evil" the Government "seeks to eliminate" are only contingently connected, the Court has recognized that the regulation is valid only where it is confined to prohibiting speech that is *in fact* conjoined with that evil.

[6] *Heffron v. International Society for Krishna Consciousness*, 452 U.S. 640 (1981)—which upheld a prohibition on "roving solicitation" and the related distribution of literature at a state fair based on the special concern with the "orderly movement of the crowd" at the fairgrounds—is in this line. 452 U.S. at 451. The *Heffron* Court proceeded on the theory that roving solicitation as a class of speech activity has an inherent adverse effect on the state's "important concern with managing the flow of the crowd." *Id.* at 452.

It is worthy of note in this regard that *Heffron* involved speech at a state fairgrounds, not on a public forum, and arose before this Court's tripartite forum analysis had fully chrystallized. It is far from clear that a similar regulation of public streets would be valid. *See, United States v. Kokinda*, 497 U.S. 720 (1990) (approving limitation on solicitation on sidewalk abutting post office only after concluded that the particular sidewalk was a non-public forum, and that a "reasonableness" standard rather than "narrowly tailored" standard applied.)

And, be that as it may, there is no basis for the proposition that public forum leafletting, handbilling, sign displays and oral protests are, as classes of speech activity, inherently or intrinsively obstructive activities and subject to government restriction as such.

Thus, for example, in *Grayned v. City of Rockford*, 408 U.S. 104 (1972), a city concerned with preventing school disturbances passed an ordinance providing that:

> "[N]o person, while on public or private grounds adjacent to any building in which a school or any class thereof is in session, shall willfully make or assist in the making of any noise or diversion which disturbs or tends to disturb the peace or good order of such school session or class thereof. . . ." Code of Ordinances, c. 28, 19.2(a) [408 U.S. at 108.]

The Court in upholding that ordinance stressed that the required "disturbance" element was essential to the validity of the ordinance as a constitutionally acceptable time, place and manner restriction:

> Without interfering with normal school activities, daytime picketing and handbilling on public grounds near a school can effectively publicize those grievances to pedestrians, school visitors, and deliverymen, as well as to teachers, administrators, and students, some picketing to that end will be quiet and peaceful, and will in no way disturb the normal functioning of the school. For example, it would be highly unusual if the classic expressive gesture of the solitary picket disrupts anything related to the school, at least on a public sidewalk open to pedestrians. On the other hand, schools could hardly tolerate boisterous demonstrators who drown out classroom conversation, make studying impossible, block entrances, or incite children to leave the schoolhouse. . . . [408 U.S. at 119-120, footnotes omitted.]

The *Grayned* ordinance, consequently, was valid precisely because it was limited to situations in which there was actual disturbance of the educational process by reason of the manner in which the protest was carried out, and because it permitted peaceful expressive activity which was not loud or raucous enough to cause such a disturbance:

> *Far from having an impermissibly broad prophylactic ordinance,* Rockford punishes only conduct which disrupts or is about to disrupt normal school activities. *That decision is made, as it should be, on an individualized basis, given the particular fact situation. Peaceful picketing which does not interfere with the ordinary functioning of the school is permitted.* And the ordinance gives no license to punish anyone because of what he is saying. [408 U.S. at 120, footnotes omitted, emphasis added.]

Similarly, in *Boos v. Barry*, 485 U.S. 312, 330-331 (1988), this Court concluded that a statute proscribing assemblies near foreign embassies "did not reach a substantial amount of constitutionally protected conduct" only after construing the statute so that it "does not prohibit peaceful congregation . . . [but] is limited to group posing a security threat." 485 U.S. at 331.

In short, where, as here, speech activity can be carried out in a way that does *not* compromise a neutral non-speech governmental interest *or* in a way that does compromise the latter, the Court has approved a time, place and manner restriction *only* where the regulation restricts speech activity that in fact involves an *actual* intrusion on the non-speech government interest—here, actual obstruction of access to medical facilities—and the regulation does *not* restrict speech activity that does *not* in fact involve an actual intrusion on the non-speech government interest.

The lesson of the foregoing for the instant case is this. The Statute here is a general phophylactic regulation of speech activity on a public forum that Colorado justifies by the legitimate government interest in preventing willful obstructions of access. But the Statute's prohibitions apply without limit or distinction to speech activity on that forum that is not intrinsically conjoined with obstructive

conduct and that does *not* in fact involve any physical obstruction of access. The Statute thus regulates expression "in such manner that a substantial portion of the burden on speech does *not* serve to advance the [regulatory] goals." *Ward*, 491 U.S. at 799 (emphasis added). That kind of overbroad regulation is the very antithesis of the "narrow tailoring" the First Amendment time, place and manner standard requires.[7]

C. It is of the essence here that the weight of the Statute's overbroad prohibitions is brought to bear on the most basic and sensitive free speech rights.

(1) As this Court has long recognized, "leafletting and commenting on matters of public concern are classic forms of speech that lie at the heart of the First Amendment . . . ." *Scheneck*, 519 U.S. at 377. Indeed, distribution of literature in the public streets is at the core of the

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7 Our demonstration in text that the Statute does not meet the "narrow tailoring" requirement is sufficient to require its invalidation on constitutional grounds without more. But there is more and we would be remiss if we did not briefly elaborate on an additional ground of invalidity we foreshadowed at the outset—the statute's regulation of oral communication is infected with unconstituitonal content discrimination. The Satute singles out from the universe of discourse "oral protest, education or counseling" and burdens only public forum communication of an oral protest/education/counseling message. And the Statute does so in the face of this Court's admonition that

> above all else, the First Amendment means that government has no power to restrict expression because of its message, its ideas, its subject matter, or its content. . . . The essence of this forbidden censorship is content control . . . .
>
> Necessarily, then, . . . government may not grant the use of a forum to people whose views it finds acceptable, but deny use to those wishing to express less favored or more controversial views. . . . Selective exclusions from a public forum may not be based on content alone, and may not be justified by reference to content alone. [*Police Department v. Mosley*, 408 U.S. 92, 95-96 (1972).]

Plainly then this aspect of the Statute can not stand.

constitutional guarantees of both freedom of speech, *e.g.*, *Jamison v. Texas*, 318 U.S. 413, 416 (1943), and freedom of the press, *e.g.*, *Lovell v. City of Griffin*, 303 U.S. 444, 452 (1938). And the protection that has been accorded this form of expression stems precisely from the recognition that "pamphlets have proved most effective instruments in the dissemination of opinion." *Schneider v. State*, 308 U.S. 147, 164 (1939). Thus, as the Court said in *Jamison*:

> [O]ne who is rightfully on a street which the state has left open to the public carries with him there as elsewhere the constitutional right to express his views in an orderly fashion. This right extends to the communication of ideas by handbills and literature as well as by the spoken word. [318 U.S. at 416.]

All this being true, from its seminal opinion in *Lovell*, *supra*—in which the Court struck down a municipal ordinance under which a Jehovah's Witness had been prosecuted for distributing religious tracts without permission from the city authorities—the Court has accorded constitutional protection to the activities of persons who were prosecuted or threatened with prosecution by local authorities for distributing handbills or leaflets addressing labor disputes, *Hague v. C.I.O.*, 307 U.S. 496 (1939); *Schneider*, 308 U.S. at 155-57, political and social concerns, *Schneider*, 308 U.S. at 154-55; *Schenck*, *supra*, and religious causes, *Lovell*, *supra*; *Schneider*, 308 U.S. at 157-59; *Jamison*, *supra*; *Lee v. International Society for Krishna Consciousness, Inc.*, 505 U.S. 830 (1992) (per curiam). *See also, e.g., DeBartolo Corp v. Florida Gulf Coast Trades Council*, 485 U.S. 568 (1988) (construing National Labor Relations Act to allow certain handbilling actiivty in order to avoid serious constitutional issue under First Amendment).

In so doing the Court has made it plain that communication on the streets is protected when it persuades to action as well as when it simply provides information or abstract thoughts. The First Amendment extends

> to more than abstract discussion, unrelated to action. . . . "Free trade in ideas" means free trade in the opportunity to persuade to action, not merely to describe facts. [*Thomas v. Collins*, 323 516, 537 (1945.)]

And, persuasive speech at the site at which a responsive action is requested, rather than on a remote unconnected street corner, comes within this constitutional protection. *See Thornhill v. Alabama*, 310 U.S. 88, 91-92, 105-106 (statute forbidding protestors from going "near . . . the . . . place of business of any persons . . . for the purpose of . . . inducing other persons not to trade with . . . such persons" as "limited or restricted in its application to such action as takes place at the scene of the labor dispute" is unconstitutional); *NAACP v. Claiborne Hardware*, 458 U.S. 886, 903, 909-910 (1982).

In sum, the right to distribute handbills, pamphlets, leaflets, or other literature in public places at issue here is a core First Amendment activity that is an integral component of the concepts of freedom of speech and freedom of the press the authors of that Amendment sought to protect. Like other aspects of these freedoms, the constitutional protection afforded the right to express one's views through the public dissemination of literature "reflects the belief of the framers of the Constitution that exercise of the[se] rights lies at the foundation of free government by free men." *Schneider*, 308 U.S. at 161.

(2) It follows from the foregoing that overbroad restrictions on public forum speech activity cut directly, and deeply, against the First Amendment grain.

Such restrictions, first of all, silence protected free speech at the Amendment's core and do so without justification in a legitimate government non-speech interest.

Moreover, as this Court has emphasized:

> "A like threat [to licensing discretion] is inherent in a penal statute, like that in question here, which does not aim specifically at evils within the allowable area of state control but, on the contrary, sweeps within its ambit other activities that in ordinary circumstances constitute an exercise of freedom of speech or of the press. The existence of such a statute, which readily lends itself to harsh and discriminatory enforcement by local prosecuting officials, against particular groups deemed to merit their displeasure, results in a continuous pervasive restraint on all freedom of discussion that might reasonably be regarded as within its purview." [*Taxpayers For Vincent*, 466 U.S. at 798 n.16 *quoting Thornhill*, 310 U.S. at 97-98.]

By the same token such overbroad restrictions provide a ready means to legislate against the activities of particular groups that in ordinary circumstances and absent the legislation constitute an exercise of free speech. The background made to the Statute here set out in the Colorado Supreme Court's opinions, for example, provide the strongest indication that this Statute is aimed at silencing the *message* of anti-abortion speakers and not simply at preventing physical obstructions and like improper conduct by anti-abortion activists.

Invalidation of the overbroad restrictions on public forum free speech activity here on First Amendment grounds is thus called for both by the time, place and manner narrow tailoring requirement and the free speech principles expressed and safeguarded by that requirement.

D. The burden of our argument is that on a straightforward application of this Court's jurisprudence governing statutory time, place and manner restrictions on speech in a public forum, the Statute here is invalid on its face. It has been suggested, nevertheless, that this Court's decisions in *Schenck*, *supra*, and *Madsen v. Women's Health Center, Inc.*, 512 U.S. 753 (1944)—somehow validate the Statute. That is to profoundly misread *Schenck* and *Madsen*.

Both cases concerned the validity of forward-looking injunctive restrictions on the speech activity of persons who had engaged, and were engaging, in speech activity *conjoined* with physically obstructive conduct. In that context, the *Madsen* Court explained that speech restrictions imposed by injunction require a "somewhat more stringent application of general First Amendment principles" than speech restrictions imposed by statutes of general application. *Madsen*, 512 U.S. at 764-765. (The injunctive restrictions are tested by asking "whether the challenged provisions of the injunction burden *no more* speech than necessary to serve a *significant* government interest." *Id.* at 765. As we have seen, in the statutory context the inquiry is whether the restriction "burden[s] *substantially more* speech than is necessary to further the government's *legitimate* interests." *Ward*, 491 U.S. at 799.

These are closely brigaded standards and their nuanced differences hardly bespeak a *carte blanche* for general prophylactive statutory restrictions on public forum free speech activity . Any doubt on that score is resolved by the indisputable point that *Madsen* and *Schenck* did not raise—and the *Madsen* and *Schenck* decisions do not address—any questions concerning the validity of speech restrictions —injunctive or statutory—that run against persons who have *not* engaged, and are *not* engaging, in public forum

leafletting, handbilling, sign display or oral protect activity *conjoined* with any kind of physical obstructive or like abusive conduct. Those cases in other words do not consider the validity of public forum speech restrictions that have *no* predicate in the speaker's past or present obstructive or like abusive conduct . And given the qualitative difference between such restrictions and restrictions so predicated, *Madsen* and *Schenck* most certainly do not suggest that a prophylactic statutory speech restriction of that kind does, or should, pass muster under the basic time, place and manner standard by which public forum statutory speech restrictions are normally tested.

CONCLUSION

Thus we return to where we began—that the Statute here judged under the basic time, place and manner standard is unconstitutional as we have shown.

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